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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 34, ~~Misc.~~.

DAVID BROCK,
PETITIONER,
vs.
THE STATE OF NORTH CAROLINA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA.

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of North Carolina

RALPH MOODY,
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BRIEF OF THE RESPONDENT,
STATE OF NORTH CAROLINA.

OPINION BELOW

The opinion of the Supreme Court of North Carolina filed on October 31, 1951, is reported at 234 N. C. 390, 67 S.E. (2d) 282, subnom. STATE v. DAVID BROCK (see Appendix, p. 17, where opinion of Supreme Court of North Carolina in this case is set out in full).

This Court granted certiorari on March 31, 1952, the record in this case in this Court being DAVID BROCK v. NORTH CAROLINA, No. 324, Misc., Oct. Term, 1951. The case was then given No. 681, Oct. Term, 1951.

QUESTIONS PRESENTED

1. The question is presented as to whether or not the petitioner in this cause has properly raised or set up and whether or not the trial court and the Supreme Court of North Carolina have passed upon or decided any claim of the infringement of any rights, privileges or immunities of the petitioner guaranteed under or protected by the Constitution of the United States.

2. The question is presented as to whether or not the right of the petitioner to be protected from successive prosecutions for the same offense in a State Court is guaranteed by the due process clause of the Fourteenth Amendment. The same question is raised by the petitioner's contention that the jeopardy provision of the Fifth Amendment is in principle incorporated in the Fourteenth Amendment.

3. The point is raised as to whether or not the adjudication of the Supreme Court of North Carolina as to what constitutes former jeopardy under the laws of that State is a final adjudication of the existence or nonexistence of such jeopardy.

4. Assuming that so-called double jeopardy or former jeopardy or exposure to excessive prosecutions for the same offense in a State Court is prohibited by the Fourteenth Amendment, does such former jeopardy, double jeopardy or exposure to excessive prosecutions for the same offense exist under the facts in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE UNITED STATES
AMENDMENT V

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

STATEMENT AND HISTORY OF THE CASE

At the regular term of the Superior Court of Edgecombe County held on October 17, 1949, the grand jury returned a true bill against the petitioner, David Brock, charging him with a secret assault with a deadly weapon with intent to kill. The petitioner was placed on trial, and the State proceeded with its case. During the progress of the trial and at the request of the Solicitor, the trial judge withdrew a juror and declared a mistrial. The trial judge made certain findings of fact which show that the Court was of the opinion that "the ends of justice require that this case not be completed and that a mistrial be ordered." (R. 16,17)

The petitioner was then tried at the March Term, 1951, of the Superior Court, and when his case was called, he entered a plea of former jeopardy (R. 3 to 18). The trial judge ruled that the facts set forth in the plea, taken to be true, were insufficient to sustain the plea and overruled and denied the same (R. 18). The Solicitor then announced that he would not ask for a verdict of guilty of secret assault but would ask for a verdict of guilty of assault with a deadly weapon (R. 19). The petitioner entered a plea of not guilty, and the trial was had.

The State introduced Alton Hathaway, who testified that on September 16, 1949, he and his wife spent the night at J. D. Wyatt's home, which is located four miles out on the Wilson Highway, west of Tarboro, North Carolina (R. 19).

For some time prior to this date, a strike had been in progress at the Hart Cotton Mills in said town. The petitioner in this case, along with the witness Hathaway and others, were on strike. J. D. Wyatt was a watchman at the plant and was not on strike.

Early on Wednesday morning, prior to the alleged assault on the following Friday, J. D. Wyatt went to the mill to go to work. As he approached the gate, he was met by Jim Cook

and a number of strikers, who blocked his entrance to the mill. Cook told Wyatt that if he went into the mill the undertaker would have a job.

On the evening of Friday, the 16th, at about seven o'clock, the witness Hathaway returned from a picket tent in Tarboro to the home of his father-in-law, J. D. Wyatt. Hathaway testified that while at the tent he saw the petitioner Brock, Jim Cook and A. Q. Blackmon (R. 21). At about 9:30 that night, his wife fed the baby, and they went to bed. Shortly after the Hathaways had retired, he heard a car slow down as it passed his house. In a minute or so, the car came back. As it passed the house, he heard five rifle shots in quick succession. Four shots came through the window of the room in which Hathaway and his family were sleeping (R. 20). One bullet lodged within five feet of the bed, another bullet passed within 36 inches of their baby, another bullet passed on through the room and into the room occupied by Mr. Wyatt.

Mr. Wyatt and Mr. Hathaway went to the police station in Tarboro and reported the shooting. On the way back to Mr. Wyatt's house, they saw petitioner Brock's car going "on the same street that goes by J. D. Wyatt's house." (R. 21) Later that night, petitioner Brock was taken to jail, and in the presence of the sheriff and other witnesses, and in the presence of one Matthews, Jim Cook made the statement that it was his rifle that was used in the shooting and that petitioner Brock actually did the shooting. Witness Cook stated to the sheriff, in the presence of petitioner Brock, that Brock helped plan the assault and that Brock "done the shooting" (R. 28). Sheriff Bardin stated that after Cook made this statement, one Matthews agreed that it was correct, and petitioner Brock said, "I have nothing to say." (R. 32)

When Brock was put on trial the first time in 1949, one Jim Cook, who was present in the automobile at the time Brock shot into the house of the prosecuting witness, was used by the State as a witness against Brock. Cook had been convicted already for his part in the affair, but he refused to answer on the advice of his counsel because he intended to appeal to the Supreme Court of North Carolina, and the trial judge ruled that he did not have to answer the State's

questions (see R. 13, 14). The same thing took place as to Elmer Matthews, a witness that the State proposed to use against Brock. Matthews had been convicted of his part in this affair, but he intended to appeal to the Supreme Court of the State, and upon advice of counsel refused to answer questions propounded by the State, and the trial court ruled that he did not have to answer such questions (see R. 14, 15, 16). It was because of this situation and because the trial judge was of the opinion that the State should eventually be allowed to have this evidence after the cases of Cook and Matthews were settled and finally adjudicated and the trial judge also being of the opinion that the ends of justice required the State to have the testimony of these witnesses, that he withdrew a juror, in his discretion, and declared a mistrial (R. 16, 17). At the March Term, 1951, of the Superior Court of Edgecombe County, petitioner Brock was again put upon trial, and the cases of Matthews and Cook having been finally adjudicated by the Supreme Court of North Carolina, Cook was then used as a witness against David Brock (evidence of Cook: R. 25). Upon all of the evidence produced, Brock was convicted and given a sentence of two years, to be assigned to work on the roads under the supervision of the State Highway and Public Works Commission.

It appears from the evidence that the petitioner Brock, as well as Wyatt, Hathaway, Matthews, Cook and others, were all out on a strike, but there was a difference of opinion among the strikers as to how the strike should be handled, and the petitioner Brock and the witness Wyatt, whose home was fired into, belonged to opposing factions of the employees out on strike. There is no evidence that Cook and Matthews stated prior to the trial that they would claim their privilege.

I.

THE PETITIONER HAS NOT PRESENTED NOR HAS THE SUPREME COURT OF NORTH CAROLINA PASSED UPON ANY QUESTION INVOLVING THE CONSTITUTION OF THE UNITED STATES OR THE CONSTITUTION OF THE STATE OF NORTH CAROLINA.

The respondent, State of North Carolina, still insists, just as it insisted in its brief opposing petition for writ of certiorari,

that the petitioner has not properly raised any constitutional question involving an infringement of the Federal Constitution or, for that matter, any infringement of the State Constitution. The petitioner's pleadings as to violation of constitutional rights will be found on R. 5, paragraphs 10 and 11 of the plea of former jeopardy. These are set forth in the form of legal conclusions, and assuming for the sake of argument that the pleadings are sufficient to raise the constitutional questions desired, we still say that it is the duty of the petitioner to request and see to it that the trial court either passes on these constitutional questions or refuses to pass upon these precise constitutional questions. A reference to the proceedings before the trial court when the plea of former jeopardy was ruled upon will plainly show that no constitutional question was considered at all.[1] It is clear that the court merely passed on the sufficiency of facts to constitute the existence or nonexistence of former jeopardy, assuming the truth of the facts, and not whether any constitutional provision had been violated. The Supreme Court of North Carolina evidently considered the question from this stand-

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[1] "PROCEEDING AND RULING ON PLEA OF FORMER JEOPARDY

"At the time of the arraignment, and before any other plea, the defendant David Brock entered the written and sworn plea of former jeopardy which is filed and appears on record. The Solicitor announced disagreement as to the legal conclusions therein, denying that the facts stated were sufficient to constitute former jeopardy.

"The Court ruled that the facts set forth in the plea, taken as true, are insufficient to sustain the plea of former jeopardy, and overruled and denied same.

"To the said ruling, defendant David Brock in apt time and manner objected and reserved an exception.

"Defendant David Brock then moved the Court to permit his plea of former jeopardy to go to the jury, and the facts to be passed on by the jury.

"The Court denied the motion. The defendant David Brock objected to said ruling in apt time and reserved an exception.

"This 7th day of March, 1951.

W. C. HARRIS
Judge Presiding

"The foregoing exception to the Court's overruling of his plea of former jeopardy constitutes defendant's
EXCEPTION NO. 1.

"The foregoing exception to the Court's denial of his motion that the Court permit his plea of former jeopardy to go to the jury, and that the facts be passed on by the jury constitutes defendant's
EXCEPTION NO. 2."

point only because the possible effect of any constitutional provision was not mentioned by the court.[2]

It is quite evident that the petitioner himself did not consider that any constitutional question had been passed upon because when he assigned his errors in the Supreme Court of North Carolina (R. 36), he simply stated:

> "The defendant assigns as error the trial court's overruling as a matter of law, assuming the truth of all facts therein set forth, the defendant's plea of former jeopardy, and in overruling the defendant's motion that the jury be permitted to pass upon the issues of facts, as shown by Exceptions 1 and 2 (R. 19)."

A reference to the proceedings before the trial court simply shows that the Solicitor or prosecuting officer: "announced disagreement as to the legal conclusions therein, denying that the facts stated were sufficient to constitute former jeopardy." Under the North Carolina law, where the decision is made on the facts alone, there being no controversy as to the existence of the facts, there is no issue for the jury, and the question of whether jeopardy exists or not is a ruling for the court (STATE v. LEONARD, 236 N. C. 126—Adv. Sheet No. 1—Issued September 5, 1952).

We think it is fundamental that the constitutional rights, privileges or immunities asserted must not only be set up in the State Court but must be denied by its decision.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454
HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722
KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299

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[2] The Court said in its opinion: "DEVIN, C. J: This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. *S. v. Dove*, 222 N. C. 162, 22 S.E. 2d 231; *S. v. Guice*, 201 N. C. 761, 161 S.E. 533. But the members of the Court are evenly divided in opinion (*Justice Valentine* not sitting) whether error in the admission of testimony as to declarations and conduct of Jim Cook in the absence of the defendant was prejudicial requiring a new trial. Hence the judgment of the Superior Court must stand affirmed, without becoming a precedent."

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480

PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051

THOMAS v. IOWA, 209 U. S. 258, 52 L. ed. 782

NEW YORK EX REL. COHN v. GRAVES, 300 U. S. 308, 81 L. ed. 666

In PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051, on page 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

Whether or not a question is properly presented to a State Court for decision should be determined by applying State laws and rules of Court.

BUENA VISTA COUNTY v. IOWA FALLS, ETC., R. R. COMPANY, 112 U. S. 177, 28 L. ed. 680

TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572

DELMAR JOCKEY CLUB v. MISSOURI EX REL. ATTORNEY GENERAL, 210 U. S. 324, 52 L. ed. 1080

MARIA MATHESON v. THE BRANCH BANK OF THE STATE OF ALABAMA, 7 Howard 258, 12 L. ed. 692

JOHN v. PAULLIN, 231 U. S. 583, 58 L. ed. 381

II.

THE PETITIONER PRESENTS NO QUESTION UNDER THE FIFTH AMENDMENT, AND THE DUE PROCESS AND PRIVILEGES AND IMMUNITIES OF THE FOURTEENTH AMENDMENT DO NOT GUARANTEE TO PETITIONER THE RIGHT NOT TO BE TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE IN A STATE COURT.

We do not think that we are required to take up any time on the question of whether or not there has been any infringement of constitutional rights of the petitioner in a State trial that are protected by the Fifth Amendment. It has been so

many times held by this Court that the first eight Amendments are directed to Federal actions or that they are limits upon action by the Federal Government and do not apply to action by the States.[3]

It seems to us that the basic question, without any consideration, is whether or not petitioner has been deprived of any basic right forbidden by the Fourteenth Amendment. Has the petitioner been deprived of any right in such a manner as to violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? The descriptive language of the fundamental rights protected varies in different cases decided by this Court. In PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288, Mr. Justice Cardozo seemed to make a distinction as to various types or kinds of double jeopardy, and he thought that the one forbidden would be a form which subjected a petitioner to "a hardship so acute and shocking that our polity will not endure it." In the same case, such fundamental rights are related to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (BROWN v. MISSISSIPPI, 297 U. S. 278, 80 L. ed. 682) It is also said that these are rights, the deprivation of which "offend those canons of decency and fairness which express the notions of justice of English-speaking people even towards those charged with the most heinous offenses." (MALINSKY v. NEW YORK, 324 U. S. 401, 89 L. ed. 1039; RACHIN v. CALIFORNIA, L. ed Advanced Opinions Volume 96—No. 5, p. 154) It is also said that this process "requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims." (RACHIN v. CALIFORNIA, *supra*) We are again told that "due process is not a mechanical instrument. It is

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[3] BARRON v. BALTIMORE, 7 Pet. 243
U. S. v. LANZA, 260 U. S. 377, 67 L.ed. 314
BRANTLEY v. GEORGIA, 217 U. S. 284, 54 L.ed. 768
PHILLIPS v. McCAULEY, 92 Fed. (2d) 790 (C.C.A. 9)
FOX v. OHIO, 5 How. 434, 12 L.ed. 410, 434
TWINING v. NEW JERSEY, 211 U. S. 78, 53 L.ed. 97
ADAMSON v. CALIFORNIA, 332 U. S. 46, 91 L.ed. 1903

not a yardstick. It is a process. * * * A requirement of fair play *** A balance of hurt complained of and good accomplished." (JOINT ANTI-FASCIST COMMITTEE v. McGRATH, 341 U. S. 163, 95 L.ed. 849)

In PALKO v. CONNECTICUT, *supra*, Mr. Justice Cardozo pointed out that in the first eight Amendments, there were many provisions directed against specific situations which were not contained in the due process clause of the Fourteenth Amendment. He called attention to the instances where prosecutions by indictment had been dispensed with by States although required by the Fifth Amendment; he called attention to the fact that in State prosecutions, the exemption as to being a witness against one's self would fail if the State elected to end it; he further cited the requirement of a jury trial by the Sixth Amendment, whereas a State can abolish the jury altogether. He then called attention to certain principles described in the First Amendment which although directed to the Federal Government, yet the principles described were so basic that they were implicit in the Fourteenth Amendment. The discussion of Mr. Justice Cardozo wherein he divided what was then considered to be basic rights implicit in the Fourteenth Amendment and also described in the first eight Amendments and drew a distinction between those rights described in the first eight Amendments, which were not so valid and basic that they were necessarily included in the Fourteenth Amendment, has been elaborated and explained further in the case of ADAMSON v. CALIFORNIA, 332 U. S. 46, 91 L.ed. 1903.

We do not see how it can be said, therefore, that the facts in this case could possibly be considered as violating any of these criteria, assuming that there are degrees of errors in State Court proceedings and assuming that under the PALKO case, there is an implication that there may be kinds of double jeopardy or gradations of double jeopardy, how can it be said under these facts that any basic or fundamental right has been violated. This petitioner was put upon trial before a jury. Two of his confederates had previously been convicted and had entered appeals to the Supreme Court of North Carolina. The State had to use the evidence of petitioner's confederates. When these two men were placed upon the

witness stand by the State, apparently under the advice of counsel, they refused to answer questions, saying that they had appealed to the Supreme Court of North Carolina and that, therefore, their own prosecutions might again be heard in a trial court. The trial judge refused to compel these witnesses to answer. The prosecuting officer for the State then asked that a juror be withdrawn and a mistrial declared because it was highly essential that he have the evidence of these witnesses. A mistrial was declared in the discretion of the court, the court finding as a fact that it was essential and necessary and that the ends of justice required that the State have this evidence available. This was all done in the discretion of the court and was warranted by all of the precedents and cases decided by the Supreme Court of North Carolina. No verdict of any jury in this proceeding was had against the petitioner. After the two witnesses, Cook and Matthews, had appealed their case to the Supreme Court of North Carolina and their convictions had been affirmed, and after this Court had denied their application for certiorari (see No. 57, Misc., *Elmer Matthews and Jim Cook, Petitioners v. State of North Carolina,* Respondent—October Term, 1950), the petitioner was then put on trial, and the witness Cook testified that he was with petitioner Brock when he fired into the house of the prosecuting witness with a rifle. This procedure is certainly nothing that shocks the conscience or violates the traditions of English-speaking people or does it violate any of the criteria which we have described above which have been used as partially descriptive of the legal process which we call due process of law (MAXWELL v. DOW, 176 U. S. 581, 44 L.ed. 597).

The Circuit Courts of Appeals of the United States who have passed on the question decidedly agree with our position in this matter.

U. S. v. RAGEN, (1950; C.C.A. 7), 184 Fed.(2d) 1001
AMRINE v. TINES, (1942; C.C.A. 10), 131 Fed. (2d) 827

In U. S. v. RAGEN, *supra*, it is said, at p. 1003:

> "The only right under the federal Constitution of which the petitioner in the case at bar claims to be deprived

is his right to be protected from double jeopardy. The sole specific reference in the United States Constitution to what is usually referred to as 'double jeopardy' is in the Fifth Amendment: '* * *.' But the Fifth Amendment is not directed to the States and applies only to offenses against, and trials under, the laws of the United States, Palko v. State of Connecticut, 302 U. S. 319, 58 S.Ct. 149, 82 L.Ed. 288; Phillips v. McCauley, 9 Cir., 92 F.2d 790.

* * * * * * * * * *

"The Supreme Court has considered the question whether the right granted in the Fifth Amendment to be not twice placed in jeopardy for the same offense is within the scope of the due process clause of the Fourteenth Amendment. In Palko v. State of Connecticut, 302 U. S. 319, 323, 58 S.Ct. 149, 151, 82 L.Ed. 288, the court stated: 'We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendents 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.'

"The court then held that the claimed double jeopardy there being considered was not a violation of the due process clause."

In AMRINE v. TINES, *supra*, it is said, at p. 833:

"And, unlike the fundamental right to assistance of counsel granted by the Six Amendent to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process."

III.

THE QUESTION OF FORMER JEOPARDY WAS PASSED UPON BY THE SUPREME COURT OF NORTH CAROLINA, AND THIS STATE ADJUDICATION SHOULD BE FINAL.

We contend that the Supreme Court of North Carolina decided this question according to its own precedents which go back for many years, and, therefore, its decision that jeopardy did not exist under an admitted state of facts should be final. The due process clause, it has been said, does not operate to enforce upon the States a uniform code of criminal procedure, and it has also been said in substance that a State can choose its own methods and practices by which crime is brought to book so long as fundamental fair play is observed (THOMAS v. IOWA, 209 U. S. 258, 52 L.ed. 787; CARTER v. ILLINOIS, 329 U. S. 173, 91 L.ed. 172). It has also been held by this Court that, assuming a party is fully heard in a regular course of judicial proceedings, a trial without error is not guaranteed by the due process clause and that an erroneous decision of a State Court is not a denial of due process.

BONNER v. GORMAN, 213 U. S. 86, 53 L.ed. 709
AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U. S. 269, 71 L.ed. 639
WEST OHIO GAS CO. v. PUBLIC UTILITIES COMMISSION, 294 U. S. 63, 79 L.ed. 761

It is certainly the rule in North Carolina that the ordering of a mistrial in a case less than capital is a matter in the discretion of the court and that in capital cases only is the judge required to find the facts and place them on record so that upon a plea of former jeopardy, the action of the court may be reviewed.[4] It will thus be seen that North Carolina has, for

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[4] Among many cases decided by the Supreme Court of North Carolina, see:
STATE v. DOVE, 222 N. C. 162, 22 S.E. (2d) 231
STATE v. GUICE, 201 N. C. 761, 161 S.E. 533
STATE v. WATSON, 209 N. C. 229, 183 S.E. 286
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many years, followed a rule of discretion and has to this extent relaxed the common-law concept of jeopardy. We in this State have not thought that all of the immunities and privileges and that the whole theory of fair play and authority should be weighed at all times in favor of those charged with criminal offenses. We have thought that the concept of equality includes the State also.

IV.

ASSUMING THAT THIS COURT HOLDS THAT FORMER JEOPARDY IN STATE TRIALS IS FORBIDDEN BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND ASSUMING THAT THIS COURT WILL DETERMINE BY ITS OWN INVESTIGATION AS TO WHETHER SUCH FORMER JEOPARDY EXISTS OR NOT, THEN UNDER THE RULES OF THIS COURT IN FEDERAL CASES, PETITIONER HAS NOT BEEN EXPOSED TO ANY FORMER JEOPARDY.

In arguing this last point, we are assuming that generally the right of a petitioner to be protected from former jeopardy or so-called double jeopardy is a right within the purview of the due process clause of the Fourteenth Amendment, and assuming also that we do not have before us the sometime perplexing question as to whether or not a petitioner is actually being tried the second time upon substantially the same indictment and with substantially the same evidence, we think that this Court has shown that even under the Federal rules as to when a mistrial will constitute former jeopardy, the petitioner is not entitled to any relief under the facts in this case. It is certainly one thing to say that if a State attempted to actually try a petitioner twice for the same offense and punish him twice for the same offense, former jeopardy or double jeopardy exists as protected by the due process clause; but it is certainly another thing to say or decide when a mistrial or a discontinuance brought about for some reason not foreseen when the trial commenced would amount to such double jeopardy or former jeopardy. In WADE v. HUNTER, WARDEN, 336 U. S. 684, 93 L.ed. 974, this Court had before it a question of double jeopardy arising under the

Fifth Amendment. Two soldiers were placed on trial before a court martial on charges of rape. There was a discontinuance because civilian witnesses were not then available. The case was then transferred from the Third Army to the Fifteenth Army for a new trial since it was impractical for the Third Army to conduct the court martial. This Court ruled in substance that the Fifth Amendment did not mean that every time a defendant was put to trial before a competent tribunal, he was entitled to go free if the trial failed to end in a final judgment. This Court in the WADE case was urged to apply the so-called "imperious" or "urgent necessity" rule which had heretofore been applied in the Circuit Courts of Appeals (CORNERO v. UNITED STATES, 48 F.(2d) 69). This Court, however, rejected such a rule and preferred to follow the rule established in U. S. v. PEREZ, 9 Wheat. 579, and in applying this rule, this Court said:

> "When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination. The guiding rule of federal courts for determining when trials should be discontinued was outlined by this Court in *United States v. Perez*, 9 Wheat. 579. In that case the trial judge without consent of the defendant or the Government discharged the jury because its members were unable to agree. The defendant claimed that he could not be tried again and prayed for his discharge as a matter of right. In answering the claim this Court said at p. 580:
>
> "'. . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which

the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. . . .'"

We think, therefore, that the State of North Carolina, under any rule having in mind the ends of justice, had a right to have a mistrial declared in this case so that the State could have available the evidence of one or both of these witnesses. It could not be foreseen that they would claim their privilege or immunity from testifying at the time petitioner was first put on trial. We ask this Court, therefore, in this case to adopt the concept expressed by Mr. Justice Cardozo in SNYDER v. MASSACHUSETTS, 291 U. S. 97, 78 L.ed. 674, where he said: "The concept of fairness must not be strained until it is narrowed to a filament. * * * There is danger that the criminal law will be brought into contempt—that discredit will even touch great immunities assured by the Fourteenth Amendment — if gossemer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

We submit, therefore, that the judgment and opinion of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

HARRY McMULLAN,
Attorney General
of North Carolina,

RALPH MOODY,
Assistant Attorney General
of North Carolina,

Counsel for Respondent,
State of North Carolina.

APPENDIX.

STATE v. DAVID BROCK
(Filed 31 October, 1951)

APPEAL by defendant from *Harris, J.*, March Term, 1951, of EDGECOMBE. Affirmed.

The defendant was indicted for secret assault on J. D. Wyatt and several others, 16 September, 1949 (G. S. 14- 31.)

There was verdict of guilty of assault with a deadly weapon, and from judgment imposing sentence defendant appealed, assigning error in the denial of his plea of former jeopardy and in the admission of certain testimony.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

Robert S. Cahoon for defendant, appellant.

DEVIN, C. J. This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. *S. v. Dove*, 222 N. C. 162, 22 S.E. 2d 231; *S. v. Guice*, 201 N. C. 761, 161 S.E. 533. But the members of the Court are evenly divided in opinion (*Justice Valentine* not sitting) whether error in the admission of testimony as to declarations and conduct of Jim Cook in the absence of the defendant was prejudicial requiring a new trial. Hence the judgment of the Superior Court must stand affirmed, without becoming a precedent.

Judgment affirmed.

VALENTINE, J., took no part in the consideration or decision of this case.

BARNHILL and JOHNSON, JJ., dissent for the reason they are of the opinion the defendant is entitled to a new trial for error in the admission of evidence of conduct and declarations of Jim Cook.

MOTION BY THE STATE THAT A JUROR BE WITHDRAWN AND A MISTRIAL ORDERED AND THE CASE CONTINUED PENDING THE FINAL JUDGMENT IN THE CASE OF "STATE v. ELMER MATTHEWS AND JIM COOK."

BY THE COURT: THE COURT FINDS AS A FACT that the Solicitor for the State tried two cases growing out of the same transaction, STATE v. JIM COOK, and STATE v. ELMER MATTHEWS, and that the evidence in said cases tended to show that the defendant David Brock fired rifle bullets into the home of J. D. Wyatt and that the defendants Jim Cook and Elmer Matthews were present, aiding and abetting him in committing said offense; that the defendants Jim Cook and Elmer Matthews were convicted at this term of court on the charge of Assault with a deadly weapon, and after their conviction the Solicitor called for trial the case of "State v. David Brock," and during the course of the trial undertook to use the defendants Jim Cook and Elmer Matthews as witnesses for the State. Whereupon, counsel for said defendants advised them not to testify that to rely upon their constitutional rights not to give testimony in respect to matters that would tend to incriminate them for that no judgment had been entered in their cases and that it was their intention to appeal to the Supreme Court if an adverse judgment was entered and the Court ruled that said defendants would not be required to testify as to facts that would tend to incriminate them for the reason that their cases had not been finally disposed of in the Supreme Court. The Court being of the opinion that the ends of justice require that the State have available for its testimony of the witnesses Jim Cook and Elmer Matthews when the case is tried and that the State is entitled to have those witnesses to testify after their cases have been disposed of in the Supreme Court, in its discretion withdraws a juror, Roland Fountain, and orders a mistrial of this case and that the same be continued.

DEFENDANT OBJECTS to the finding of facts, conclusions of law and the ruling of the Court. Overruled. EXCEPTION.

BY THE COURT:

Ladies and Gentlemen of the Jury, you have been listening for a part of yesterday and today to the trial of the case of "State v. David Brock" and have heard some argument in respect to the testimony of certain witnesses and part of the argument you did not hear, but the State having under-

taken to offer the testimony of two witnesses, Jim Cook and Elmer Matthews, and for certain reasons that have been made to appear to the Court, the testimony of those witnesses, at the present time, is not complete and available to the State, the Court is of the opinion that the ends of justice require that this case not be completed and that a mistrial be ordered and this case continued to such time as the testimony of those witnesses might be available for the State without any legal objections to it. Therefore, the Court in its discretion has withdrawn a juror and ordered a mistrial in this case and the jurors will not be concerned with the case any further.

The Court desires to thank you.